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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN A. GEORGEDES, :
Plaintiff and Respondent, :
v. : No. 17073
BONI A. GEORGEDES, :
Defendant and Appellant. :

BRIEF OF DEFENDANT AND APPELLANT

Appeal from Judgment of the
Seventh District Court for
Carbon County, State of Utah
Honorable Boyd Bunnell

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Plaintiff and Respondent, :
v. : No. 17073
BONI A. GEORGEDES, :
Defendant and Appellant. :

BRIEF OF DEFENDANT AND APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action in divorce.

DISPOSITION IN LOWER COURT

A Decree of Divorce was entered awarding each of the parties a Decree of Divorce from the other; awarding plaintiff all home and business real property and other business and personal assets; awarding defendant certain personal property and restoration of her former name.

RELIEF SOUGHT ON APPEAL

Appellant seeks an equitable division of jointly owned real property, an award of alimony reasonably related to her prior household allowance, and an award of attorney's fees incurred in this action.

STATEMENT OF FACTS

Defendant-appellant, Boni A. Georgedes (hereinafter "Boni") was married to plaintiff-respondent, John A. Georgedes (hereinafter "John"), on April 15, 1972. (F.F. 2, R. 120).

At the time of the marriage of the parties, John operated laundry and dry cleaning business which he was purchasing from father, (F.F. 5, R. 121) and a home which he had acquired prior to the marriage. (F.F. 5, R. 121).

At the time this action was commenced and for about seven (7) years prior, John and Boni were owners, subject to debts thereon, of the home of the parties and Price Self Service Laundry, including the building and land. (F.F. 5, R. 121; Ex. 7).

For the greatest part of their marriage, John paid Boni a household allowance of six hundred dollars (\$600.00) per month (Tr. 10, L. 19-25) with which she purchased food for the family and household furniture (Tr. 71, L. 19-23; Tr. 78, L. 19-22), and improved the home of the parties. (Tr. 69, L. 16-20).

From early in the marriage difficulties arose between the parties which Boni sought to resolve by obtaining counseling, but which John declined. (Tr. 35, L. 3-25; Tr. 36, L. 1-7; Tr. 37, L. 12-16).

Boni has a son by a prior marriage who receives veteran's and social security survivor's benefits and is the beneficiary of a trust account established by the Utah Industrial Commission arising from the death of his father in an industrial accident (R. 95; R. 101; F.F. 8, R. 123).

Following trial of the matter, the Court entered its Memorandum Decision on October 15, 1979. (R. 92-97). Defendant's motion for a new trial was filed November 26, 1979, (R. 98-100), in-

cluding as a basis therefor the claim that the award to defendant was inadequate, appearing to have been given under the influence of passion or prejudice. The Court then entered a "Supplemental Order" (R. 111) authorizing restoration to Boni of her former name. Defendant thereafter moved the Court for an Order to Show Cause generally seeking enforcement of compliance with the Rules of Practice of the District Courts (R. 113) which was denied. (R. 119). Ultimately, on March 19, 1980, Findings of Fact and Conclusions of Law and the Decree of Divorce were entered (R. 120-128) and on March 31, 1980, defendant's motion for a new trial was denied. (R. 136-138).

Whereupon this appeal was taken.

ARGUMENT

Point I

THE TRIAL COURT ERRED IN IGNORING THE LAWFUL MARRIAGE OF THE PARTIES IN AWARDING PROPERTY AND SUPPORT

The court found (F.F. 2, R. 120) that, "Plaintiff and defendant were married on April 15, 1972, since which time they have been and now are husband and wife." In contradiction of that finding of lawful marriage, the court expressly based denial of alimony upon, among other things, "that the actual factual marriage relationship of the parties was an extreme short duration." (R. 93-94; F.F. 10; R. 124). The conclusion is incapable that the court's determination in this regard affected all other matters before it, including award of marital property.

The contradiction itself begs logic; the findings of the court amount to a nunc pro tunc determination of divorce a mens et thoro. Even in this analogy, the court may not ignore the obligation of support a husband owes his wife. (24 Am.Jur. 2d Divorce and Separation, Section 1, n.1, citing Pettis v. Pettis, 91 Conn. 608, 101 A 13, 4 ALR 852)

In relying upon the artificially truncated length of the marriage, the trial court has flown in the face of prior decisions of this Court. In English v. English, Utah, 565 P.2d 409 (1977) this Court condemned, "the standard utilized by the trial court, viz., the length of the marriage and the contributions of each to their joint financial success [as]...an appropriate measure to determine alimony."

The legislature of the State of Utah has enacted laws governing the marriage relationship (Section 30-1-1, et. seq., U.C.A. 1953, as amended) and, no determination having been made that a marriage is void or voidable, or any challenge to its legality having been raised, the trial court improperly chose to disregard the legal status of the marriage, and, further, to impose a judicial interpretation which violates the separation of powers mandated by Section 1, Article V, of the Constitution of Utah.

In the event this matter is remanded for trial, the trial court should be instructed to consider this matter in light of the actual legal period of the marriage.

Point II

THE TRIAL COURT ERRED IN DIVESTING THE DEFENDANT OF HER JOINT TENANCY INTEREST IN REAL PROPERTY

A trial court may not ignore the conveyance of real property to a spouse (e.g., R. 94) such as here, where John conveyed to Boni a joint tenancy interest in one of the businesses and the home of the parties seven years prior to the divorce, but, must presume the validity of the conveyance. (Section 30-2-2 U.C.A., as amended).

The court made extensive findings under the rubric "Defendant's Property" (R. 123, para. 8), but did little more than list assets under the rubric "Plaintiff's Property" (F.F. 5, R. 121).

While the court found that "during the initial year of the marriage, plaintiff placed his wife's name as a joint tenant with him on the family home and the coin operated laundry in Price, Utah" [emphasis added] (F.F. 5, R. 121), that language denigrates the legal status of the parties, relative to the property, which might more accurately be stated that "from approximately seven years prior to initiation of this action, plaintiff and defendant owned, as joint tenants, the home of the parties and the coin operated laundry in Price, Utah." Inasmuch as those jointly owned properties were treated as "Plaintiff's Property." (F.F. 5, R. 1212) the court demonstrated a predisposition to award the joint tenancy property to John by simply dismissing the conveyance

out-of-hand as an irrelevancy.

Although a trial court has "the power to take property from one spouse and to award it to another where the interests of justice so requires," "the court cannot act arbitrarily or on supposition or on conjecture as to facts upon which to justify its order." Iverson v. Iverson, Utah, 526 P.2d 1126 (1974) cit. Slaughter v. Slaughter, 18 Utah 2d 274, 421 P.2d 503 (1966). Thus in taking property from one spouse and awarding it to the other, as was done here with joint property, it seems clear that a trial court must make specific findings upon which the award is based, and resort should not be made to ex post facto editing, synopsizing of the findings to justify the action. (R. 131, para. 2)

Where, as here, a court awards all of the capital assets of a marriage to one party, all factual matters should be scrutinized to insure that the court's division of property is equitable. (Pope v. Pope, Utah 589 P.2d 752, 753 (1978)).

The trial court ignored Boni's legal ownership of these assets; her continued contribution to their acquisition during marriage; her liability for debts attendant to their acquisition and preservation; the legislative direction that conveyances between husband and wife are to be treated as valid as if made between other persons (30-2-3, U.C.A. 1953, as amended); and that a wife's property rights are independent of her husband and may not be dismissed at the whim of the trial court (Section 30-2-1).

U.C.A. 1953, as amended).

The only evidence given as to the value of the home of the parties was the un rebutted testimony of Boni (Tr. 69, L. 4-9) that the home was conservatively worth seventh thousand dollars (\$70,000.00); at about the time of the marriage the home was appraised as having a value of twenty nine thousand dollars (\$29,000.00). (R. 62, Ans. 4(e)). Debt on the property at about the time of initiation of this action totaled \$16,219.20, (R. 40-41, Ans. 6(b) and 6(c)), resulting in apparent equity of approximately fifty three thousand dollars (\$53,000.00), and an increase in value during the marriage of approximately forty one thousand dollars (\$41,000.00).

As to the business owned in joint tenancy, the Price Self Service Laundry, the only evidence was the undisputed testimony of Boni (Tr. 70, L. 21-25) that it had a conservative value of seventy five thousand (\$75,000.00) to one hundred thousand dollars (\$100,000.00). Plaintiff supplied an appraisal made in April, 1975, showing the premises to have a fair market value of \$48,167.00 (R. 79-81). The debt against the Price Self Service Laundry as of June 11, 1979, was \$19,054.79 (R. 40, Ans. 6(a)), and a portion of the balance owing to his father totaling \$46,351.25 as of July 1, 1979, (R. 41, Ans. 6(a)). Since the total agreed upon purchase price (R. 66-67) allocated to the Price Self Service Laundry of forty seven thousand dollars (\$47,000.00) represents forty two percent of the total purchase price for the

laundry business, the pro rata amount owing to John's father; the Price Self Service Laundry would be \$19,467.53. There is apparent equity in the Price Self Service Laundry owned jointly the parties of between thirty eight thousand dollars (\$38,000) and sixty three thousand dollars (\$63,000.00).

Having concluded, as to the business, that, "except for perhaps the inflated value attached to the real property, there is not evidence before the court of any increase in net worth that is not offset by the increase in indebtedness [and that] the evidence shows that the business has little value from an income standpoint and remains open purely as a result of the charity of plaintiff's father" and as to the home, that "there is no evidence presented to the court to show what [the increase in value during the marriage] may be," (R. 94) the calculations set forth above to demonstrate equity were rendered unnecessary.

It cannot pass without remark that John, at every step, disclaimed any ability to express an opinion as to value of the joint property of the parties (R. 60, Ans. 1(i), 2(i), 3(f), Tr. 42, L. 24-25, Tr. 43, L. 1-7) and that the court only reluctantly permitted Boni to express an opinion as to the value of the property (Tr. 70, L. 3-14), and misstated Utah law in support of its apparent intent to disregard her opinion. (State of Utah by and through its Road Commission v. Dillree, 25 Utah 2d 184, 481 P.2d 507 (1970) citing Salt Lake & Utah R. Co., v. Schramm, 53 Utah 53, 189 P. 90). In addition, "it has long been the rule

this state that an owner of real property, who is familiar with his property, is entitled to testify as to its value and to give his opinion thereon." Williams v. Oldroyd, Utah, 581 P.2d 561 (1978) citing Provo River Water Users Ass'n v. Carlson, 103 Utah 93, 133 P.2d 777 (1943).

By its action, the trial court has divested Boni of her joint tenancy interest in property having equity, according to her testimony which was the only evidence presented as to value, totaling between ninety one thousand dollars (\$91,000.00) and one hundred sixteen thousand (\$116,000.00).

Point III

THE TRIAL COURT ERRED IN CONSIDERING THIRD PARTY INCOME AND ASSETS IN MAKING AWARDS OF PROPERTY AND ALIMONY

The trial court made much of the fact (F.F. 8, R. 123) that by John's support of Boni's child, "assets had been accumulated having an aggregate value in excess of \$25,000.00." The court acknowledged the parties' agreement that survivor's benefits payable to Boni's child were to be put in savings for the child's future (Tr. 85, L. 25; Tr. 8, L. 1-13; Tr. 59, L. 15-19), but regarded those savings as an asset "which she can see as she sees fit" (R. 95, F.F. 8, R. 123) contrary to Boni's un rebutted testimony (Tr. 60, L. 24-25; Tr. 61 L. 1, 2) and affirmation of the fact by the Industrial Commission of Utah (R. 101) that "the money deposited in [the savings account for Troy G. Nichols, minor son

of Gary Nichols, deceased] is not meant to provide monthly support money. It can be withdrawn upon application to and approval by the Industrial Commission if good cause is shown." The existence and conditional nature of that account were well known to counsel for plaintiff who, as an officer of Carbon Emery Bank (R. 134, para. 2) received the Industrial Commission award (R. 105), and as a director of Zions First National Bank, successor to Carbon Emery Bank, apparently remains privy to information regarding that account. (Tr. 60, L. 14-25; Tr. 61, L. 1-25; Tr. 62, L. 1-25). Since the court indicated a clear intent (Tr. 62, L. 4-6) to regard that savings account as Boni's own money, an asset acquired by her as a result of the marriage (F.F. 8, R. 123); and as an asset to offset increased value in the home (R. 95), no amount of evidence could have altered the result.

The balance of the funds, being held in an informal trust arrangement pursuant to agreement of the parties, should not be disturbed by regarding the accumulated amounts as a "trade off" for any support which John may have rendered Boni's child.

Since commencement of this action, the legislature of the State of Utah has declared the public policy that, "a step parent shall support a step child to the same extent that a natural or adoptive parent is required to support a child." (78-45-4.1, U.C.A. 1953, as amended). While not retrospectively applicable to this action, that enactment simply continues and reinforces the practical fact of life that support of a step child cannot reasonably

tically be regarded apart from support rendered its parent. Research does not disclose a case where a trial court has evaluated support rendered a step child and regarded that calculated amount as an asset of the child's natural parent in awarding division of property. The court further, erroneously, regarded monthly benefit payments to Boni's child in computing her monthly income (R. 124, para. 9). Inasmuch as John has no continuing obligation to support Boni's child by a prior marriage, the child's income and expenses are not properly considered in establishing the need for alimony. Boni's affidavit (R. 22) fairly stated her monthly expenses, and it must have been against that un rebutted figure that the court should have examined Boni's need for support.

Point IV

THE TRIAL COURT ERRED IN IGNORING PLAINTIFF'S HISTORICAL ABILITY TO PAY SUPPORT IN DENYING ALIMONY

"In the recent decisions of Cummings v. Cummings, 562 P.2d 229, 1977, and Westenskow v. Westenskow, 562 P.2d 1256, 1977, this court ruled the trial court may properly consider a husband's historical earning ability, when he has experienced a temporary decrease in income, when determining the amount he should contribute for the support and maintenance of his family. The principle should be equally applicable, when the husband experiences unusual prosperity during one year. (English v. English, supra). Somehow, during the greatest part of this seven year marriage, John was

able to pay Boni a household allowance of six hundred dollars (\$600.00) per month for nearly seven years, until just short before the complaint was filed (Tr. 37, L. 9-22), and was able to make all other monthly payments. (Tr. 38, L.3-6). It may well be that inadvertance has permitted the one hundred percent cash operation of the Helper Coin-Op, eighty percent cash operation of the Price Self Service Laundry, and the nineteen percent cash operation of the Price Steam Laundry (R. 64, Ans. 11(a)) to enable John's bookkeeping, although they were available for support of the family during the marriage.

The court's finding (F.F. 10, R. 124) "that the plaintiff does not have the ability to pay alimony" appears to be based principally upon the fact that "he is required to pay for the support and insurances for his children by a his first marriage (F.F. 7, R. 123), which obligations will shortly terminate (Decree of Divorce, p. 3, para. 2 and 3) and which, in any event he has not paid according to the terms of the Decree. (Tr. 21, 23-24, passim). Moreover, the support obligations were in existence and known to John at the time he entered into marriage with Boni, and the marriage altered neither the prior support obligation nor his treatment of that obligation.

The evidence given in the case does not support John's claim of impecuniosity. Until just prior to the divorce, he was well able to support his family by paying ordinary bills in addition to a household allowance. (Tr. 37-38). While the court refused

allow testimony regarding the possibility that John's father had no intention of collecting the balance of the purchase price for the business (Tr. 42), there is a clear inference that this is the fact.

John's marriage to Boni, knowing that she depended upon him financially just as he depended upon her for the amenities of marriage including household management, requires that he assist her financially until, at the very least, she can achieve the financial independence she is actively seeking. (Tr. 64, 72).

The apparent contradiction of John's precarious financial condition contrasted with a local bank's willingness to loan him money without current financial statements (Tr. 88, L. 16-18) is probably best explained by the remark of John's counsel (whose official banking position must be remembered) that "this is just a little country town and everybody knows what you've got." (Tr. 89, L. 22-23).

Point V

THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT AN AWARD OF ATTORNEY'S FEES

Boni testified (Tr. 81, L. 4-8) regarding her arrangement for attorney's fees in this matter. Neither the court nor counsel for the plaintiff questioned the arrangement, the total fees, nor their reasonableness. The very bulk of the record eloquently demonstrates the devotion of so many hours of time in attempting to resolve, and later defending, this action. Much of

the effort of Boni's counsel was expended in attempting to secure faithful performance of rules promulgated by this Court and the avoidance of procedural conduct of the case prejudicial to Boni's interest.

Apart from the plaintiff's fault in aggrandizing Boni's attorney's fees, which should be considered, the court failed to consider that, in awarding John all of the income and income producing assets of the marriage, it had deprived Boni of any realistic practical means of paying her attorneys fees.

In denying any award, the Court again relied upon the survivor's benefits which had been accumulated for Boni's son. (R. 96)'.
}

Based upon John's fault in the conduct of this action, and Boni's financial inability, this Court should order that John pay Boni's attorney's fees incurred in defending the action and prosecuting this appeal.

Point VI

THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL

One of the grounds upon which defendant sought a new trial was "excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice." (R.98, para. 2).

The conduct of the suit, the transcript, and the orders of the court are replete with examples of bias which favor the plaintiff.

Notwithstanding the extreme difficulty with which information was extracted from the plaintiff upon written interrogatories, over the objection of counsel for defendant, the court set a trial date which effectively foreclosed further, fruitful discovery. (R. 58)

The court failed to comply with Rule 4.1 of the Rules of Practice of the District Courts by setting a special trial date at a time when the plaintiff was in default by having failed to answer the counter-claim; this matter not being one of extraordinary urgency; notice of a special trial setting to all parties upon good cause shown was not given; and there was no written stipulation as required by Rule 15 of the Rules of Practice of the Seventh Judicial District Court.

In trial, the court refused to allow questioning of the plaintiff regarding possible forgiveness of a debt owing to his father (Tr. 42) although the court utilized that debt in calculating plaintiff's total indebtedness (R. 122); the court quarreled with the defendant's right to state an opinion as to her estimate of value of real property of the marriage, but in a manner indicative of intent to disregard the opinion allowed her testimony (T. 70). The court refused to allow testimony regarding income to be derived from Boni's child's assets (T. 67-68) though he had previously permitted testimony relative to those assets on examination by counsel for plaintiff, over objection (T. 51), and though he ultimately used that prospective income in assessing defen-

dant's need for alimony (R. 124 para. 9).

Post-trial, the court failed to require compliance with Rule 2.9 of the Rules of Practice of the District Courts that a proposed Decree be filed within fifteen (15) days after the ruling of the court, and, when the failure was brought to the court's attention pursuant to Rule 2.8 of the Rules of Practice, the court permitted the matter to be set for hearing upon notice inadequate under Rule 6(a) and (b) of the Utah Rules of Civil Procedure and Rule 2.8(d) of the Rules of Practice, and at that hearing simply struck the matter.

The admissions and refusal to admit testimony at trial, and the findings and various orders of the court demonstrates a clear pattern by the court to so construct the evidence as to extinguish, by ignoring, Boni's rights in marital property and her right to support.

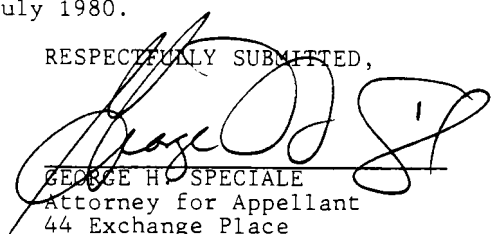
CONCLUSION

The trial court effectively decreed an annulment of this seven year marriage. Equity dictates no less than that the joint property of the parties be sold and equity divided between them; that there should be awarded alimony not less than the five hundred dollars (\$500.00) a month she last received as a household allowance; and that she be awarded her attorney's fees incurred principally by the respondent's lack of good faith in conducting this case, and her financial inability to bear the costs and expenses incurred in defending the action and prosecuting this

appeal

DATED this 18th day of July 1980.

RESPECTFULLY SUBMITTED,



GEORGE H. SPECIALE
Attorney for Appellant
44 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-5835

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of July, 1980, I mailed two true copies of the foregoing BRIEF OF DEFENDANT AND APPELLANT to the attorney for the plaintiff-respondent herein, Therald N. Jensen, Attorney at Law, 190 North Carbon Avenue, Price, Utah 84501, by mailing said copy through the United States Mail, postage prepaid.